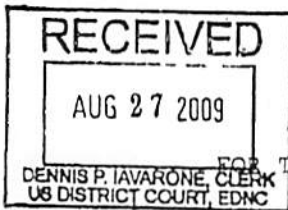


**APPENDIX**

- PX-1 - Affidavit of Petitioner
- AX-1 - Plea Agreement
- PX-2 - Letter from Attorney Edwards
- PX-3 - Letter to FBI of January 14, 2016
- PX-4 - Letter of Denial from FBI of June 10, 2016, Citing Plea Agreement Waiver
- PX-5 - Appeal Letter of June 20, 2016
- PX-6 - Letter from FBI of July 14, 2016, Stating Appeal in Process
- PX-7 - Letter of Denial of Appeal of July 18, 2016
- PX-8 - Second FOIA Request of March 19, 2018
- PX-9 - §2241 Response with Exhibit of Plea Agreement
- PX-10 - Letter of Denial of May 9, 2018, Citing Plea Agreement Waiver
- PX-11 - Letter of Appeal of May 14, 2018
- PX-12 - Letter from FBI of June 5, 2018 Stating Appeal in Process
- PX-13 - Letter from FBI of July 13, 2018 Stating Combining Appeals
- PX-14 - Letter of Denial of July 18, 2018
- PX-15 - Letter to FBI of August 4, 2018 Requesting Investigation



FILED IN OPEN COURT  
ON 9-21-09  
Dennis P. Iavarone, Clerk  
US District Court  
Eastern District of NC

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
SOUTHERN DIVISION

NO. 7:09-CR-109-1-D

UNITED STATES OF AMERICA )

v. )

JOSEPH MICHAEL GUARASCIO )

MEMORANDUM OF PLEA AGREEMENT

The United States of America ("United States"), by and through the United States Attorney for the Eastern District of North Carolina ("USA-EDNC"), and the Defendant, with the concurrence of the Defendant's Attorney, Mark E. Edwards, have agreed that the above-captioned case should be concluded in accordance with this Memorandum of Plea Agreement as follows:

1. This Memorandum constitutes the full and complete record of the Plea Agreement. There are no other agreements between the parties in addition to or different from the terms herein.

2. The Defendant agrees:

- a. To waive Indictment and plead guilty to the Criminal Information herein.
- b. To make restitution to any victim, including any victim with respect to a Count dismissed as part of the agreement, in whatever amount the Court may order, pursuant to 18 U.S.C. §§ 2259, 3663 and 3663A. Said restitution shall be due and payable immediately.
- c. To waive knowingly and expressly all rights, conferred by 18 U.S.C. § 3742, to appeal whatever sentence is imposed, including any issues that relate to the establishment of the advisory Guideline range, reserving only the right to appeal from a sentence in excess of the applicable advisory Guideline range that is established at sentencing, and further to waive all rights to contest the conviction or sentence in any post-conviction proceeding, including one pursuant to 28 U.S.C. § 2255, excepting an appeal or motion based upon grounds of ineffective assistance of counsel or



AX-1

prosecutorial misconduct not known to the Defendant at the time of the Defendant's guilty plea. The foregoing appeal waiver does not constitute or trigger a waiver by the United States of any of its rights to appeal provided by law.

- d. To waive all rights, whether asserted directly or through a representative, to request or receive from the United States any records pertaining to the investigation or prosecution of this matter, except as provided in the Federal Rules of Criminal Procedure. This waiver includes, but is not limited to, rights conferred by the Freedom of Information Act and the Privacy Act of 1974.
- e. To assist the United States in the recovery and forfeiture of any assets which facilitated and/or were acquired through unlawful activities, including all such assets in which the Defendant has any interest or control. To assist the United States in the recovery and forfeiture of any assets which facilitated and/or were required through unlawful activities, including all such assets in which the defendant has any interest or control. Specifically, the Defendant agrees to voluntarily forfeit and relinquish to the United States the property specified in the Information. The Defendant further agrees to sign any documents necessary to effectuate the forfeiture and waives any further notice. In addition, the Defendant forfeits and otherwise waives any ownership right in all items seized during the investigation of the acts alleged in the Information. The Court has jurisdiction over the disposition of such items and may order the investigative agency to dispose of the items in such manner as provided by the agency's regulations.
- f. To pay a special assessment of \$100.00, pursuant to the provisions of 18 U.S.C. § 3013. The assessment shall be paid by the Defendant at sentencing. The Defendant or Defendant's counsel shall provide a check in payment of the said assessment directly to the Clerk, U.S. District Court/EDNC.
- g. To complete and submit, if requested, a financial statement under oath to the Office of the USA-EDNC no later than two weeks after the entry of the guilty plea.

- h. To abide by any conditions of release pending sentencing and report timely for service of sentence.
- i. Whenever called upon to do so by the United States, (1) to disclose fully and truthfully in interviews with Government agents information concerning all conduct related to the Information and any other crimes of which the Defendant has knowledge, and (2) to testify fully and truthfully in any proceeding. These obligations are continuing ones. The Defendant agrees that all of these statements can be used against the Defendant at trial if the Defendant withdraws from this plea agreement or is allowed to withdraw the guilty plea.
- j. If the Defendant provides false, incomplete, or misleading information or testimony, this would constitute a breach of this Agreement by the Defendant, and the Defendant shall be subject to prosecution for any federal criminal violation. Any information provided by the Defendant may be used against the Defendant in such a prosecution.
- k. To submit to a polygraph examination whenever requested by the Office of the USA-EDNC. The results of these examinations will be admissible only at the Defendant's sentencing, and at any hearing as to whether there has been a breach of this agreement. The United States may rely on these results in determining whether the Defendant has fulfilled any obligation under this Agreement.
- l. To knowingly and expressly waive any and all rights, under the Fifth and Sixth Amendments to the United States Constitution and any cases interpreting them, to have the existence and applicability of any prior convictions (1) charged in the Information, (2) submitted to a jury, and (3) proved beyond a reasonable doubt. The defendant hereby consents to having the existence and applicability of any such convictions decided by the sentencing judge based on a preponderance of the evidence. The defendant reserves the right to contest at sentencing the existence of any such prior conviction and whether such conviction qualifies to increase the statutory minimum and maximum sentence, but consents to the resolution of any such objection by the sentencing

judge using a preponderance-of-the-evidence standard.

3. The Defendant understands, agrees, and admits:

a. That as to the Information to which the Defendant is pleading guilty, the charge, code section, elements, and applicable penalties are as follows:

(1) Charge: Manufacturing Child Pornography

(2) Dates of the offense: May, 2008.

(3) Code: 18 U.S.C. §§ 2251(a) and (d)

(4) Elements:

First: The Defendant attempted to and did employ, use, persuade, induce, entice, and coerce;

Second: a minor child;

Third: to engage in sexually explicit conduct;

Fourth: for the purpose of producing visual depictions of such conduct; and

Fifth: the visual depictions were produced using materials that had been mailed, shipped, and transported in interstate and foreign commerce.

(5) Maximum term of imprisonment: 30 years.

(6) Minimum term of imprisonment: 15 years

(7) Maximum term of supervised release: minimum 5 years up to life

(8) Maximum term of imprisonment upon revocation of supervised release: up to life

\* If the defendant has ONE prior conviction under Chapter 110, section 1591, chapter 71, chapter 109A, or chapter 117 under Title 18, United States Code, or under section 920 of Title 10 or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual

contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment or transportation of child pornography, then the applicable penalties in lieu of (4) through (7) above are as follows:

- \* (4) Maximum term of imprisonment: 50 years
  - \* (5) Minimum term of imprisonment: 25 years
  - \* (6) Maximum term of supervised release: minimum 5 years up to life
  - \* (7) Maximum term of imprisonment upon revocation of supervised release: up to life
  - (8) Maximum fine: \$250,000
  - (9) Restitution pursuant to 18 U.S.C. §§ 2259, 3663 and 3663A, and as agreed in paragraph 2(b) above.
  - (10) Special assessment: \$100
- b. That any sentence imposed will be without parole.
- c. That the Court will take into account, but is not bound by, the applicable United States Sentencing Guidelines, that the sentence has not yet been determined by the Court, that any estimate of the sentence received from any source is not a promise, and that even if a sentence up to the statutory maximum is imposed, the Defendant may not withdraw the plea of guilty.
- d. That, unless Defendant is found unable to pay, the Court will impose a fine, and failure to pay it will subject Defendant to additional criminal and civil penalties pursuant to 18 U.S.C. §§ 3611-14.
- e. The defendant has been advised and understands, that under the Sex Offender Registration and Notification Act, the defendant must register and keep the registration current in each of the following jurisdictions: the location of the defendant's residence, the location of the defendant's employment; and, if the defendant is a student, the location of the defendant's school. Registration will require that the defendant provide information

AUG. 13. 2009 1:43PM

NO. 94: 2. 2

and addresses of any places at which the defendant is or will be an employee or a student. The defendant understands that he must update his registrations not later than three business days after any change of name, residence, employment, or student status. The defendant understands that failure to comply with these obligations subjects the defendant to prosecution for failure to register under federal law, 18 U.S.C. § 2250, which is punishable by a fine or imprisonment, or both.

4. The United States agrees:

- a. That it reserves the right to make a sentence recommendation.
- b. That it reserves the right at sentencing to present any evidence and information pursuant to 18 U.S.C. § 3661, to offer argument or rebuttal, to recommend imposition of restitution, and to respond to any motions or objections filed by the Defendant.
- c. That the USA-EDNC will not further prosecute the Defendant for conduct constituting the basis for the Information; however, this obligation is limited solely to the USA-EDNC and does not bind any other state or federal prosecuting entities.
- d. That it will make known to the Court at sentencing the full extent of the Defendant's cooperation, but the United States is not promising to move for departure pursuant to U.S.S.G. §5K1.1, 18 U.S.C. § 3553(e), or Fed. R. Crim. P. 35.
- e. Pursuant to U.S.S.G. §1B1.8, that self-incriminating information provided by the Defendant pursuant to this Agreement shall not be used against the Defendant in determining the applicable advisory Guideline range, except as provided by §1B1.8 and except as stated in this Agreement. The United States will not, however, withhold from the United States Probation Office any evidence concerning relevant conduct.
- f. That the USA-EDNC agrees not to share any information provided by the Defendant pursuant to this Agreement with other state or federal prosecuting entities except upon their agreement to be bound by the terms of this Agreement.

AUG. 13. 2009 1:43PM

NO. 941 P. 3

5. The parties agree to the following positions as to the below-listed sentencing factors only, which are not binding on the Court in its application of the advisory Guideline range; provided that if Defendant's conduct prior to sentencing changes the circumstances with respect to any such factors, the United States is no longer bound to its positions as to those factors:

- a. A downward adjustment of 3 levels for acceptance of responsibility is warranted under U.S.S.G. §3E1.1.

This the 24<sup>th</sup> day of August, 2009.

GEORGE E.B. HOLDING  
United States Attorney

Joseph M. Guarascio  
JOSEPH MICHAEL GUARASCIO  
Defendant

BY: Ethan A. Ontjes  
ETHAN A. ONTJES  
Assistant United States Attorney  
Criminal Division

Mark E. Edwards  
MARK E. EDWARDS  
Attorney for the Defendant

APPROVED, this 21 day of September, 2009.

James Deves  
United States District Judge



**EDWARDS & TRENKLE, PLLC**

ATTORNEYS AT LAW  
315 East Chapel Hill Street, Suite 301  
P.O. BOX 77  
DURHAM, N.C. 27702

TEL. (919) 688-9555 FAX (919) 683-5650

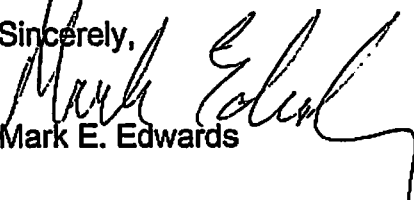
August 17, 2009

Joseph Guarascio  
c/o Brunswick County Jail  
P.O. Box 9  
Bolivia, NC 28422

Dear Mr. Guarascio:

I just received your most recent letter. All I can say is, I hope you are prepared to spend the rest of your life in prison.

Sincerely,



Mark E. Edwards

PX-2

Joseph M. Guarascio  
Req. # 70537-056  
F.C.I. Ft. Worth  
Ft. Worth, TX 76119

January 14, 2013

Federal Bureau of Investigation  
Record / Information Dissemination Section  
170 Marcel Drive  
Winchester, VA. 22602-4843

Re: FOIA / Privacy Act Request

Dear Public Information Officer:

Pursuant to the Freedom of Information Acts, 5 USC §§ 552, 552 (a) et seq., respectively, please provide copies of the following:

1. Documents (whenever generated), property vouchers of seized property or evidence, any documentation provided or turned over to your agency by other law enforcement agencies, transcripts of (audio, video) interviews pertaining to the prosecution in the following case.

United States v. Joseph Michael Guarascio  
7:09-cr-00109-D-1  
U.S. District Court for the  
Eastern District of North Carolina  
Federal Req. # 70537-056

and / or

Any documents regarding my name:  
Joseph Michael Guarascio  
D.O.B. 05/11/1964  
P.O.B. Queens, NY.  
S.S.# 063-56-6464

I would be willing to pay reasonable search and reproduction fees.

Respectfully,

Joseph Guarascio

PX-3



Federal Bureau of Investigation

Washington, D.C. 20535

June 10, 2016

MR. JOSEPH MICHAEL GUARASCIO  
\*\*70537-056  
F.C.I. FORT WORTH  
POST OFFICE BOX 15330  
FORT WORTH, TX 76119

FOIPA Request No.: 1344722-000  
Subject: GUARASCIO, JOSEPH MICHAEL  
DOCUMENTS, PROPERTY VOUCHERS,  
EVIDENCE, ETC

Dear Mr. Guarascio:

This is in further reference to your Freedom of Information/Privacy Acts (FOIPA) request.

Pursuant to the terms of a Plea Agreement dated August 24, 2009 which you and your attorney, Mark E. Edwards, entered into with the United States of America in the case captioned United States v. Joseph Michael Guarascio Case No: 7:09-CR-00109-D-1, United States District Court, District of North Carolina, Eastern Division, ("Plea Agreement"):

You waived all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case including, without limitation, any records that may be sought under the Freedom of Information Act, 5 U.S.C. §552, or the Privacy Act of 1974, 5 U.S.C. §552a.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

Accordingly, we cannot process your FOIPA request and are unable to be of any further assistance in this matter.

You may file an appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site: <https://foiaonline.regulations.gov/foia/action/public/home>. Your appeal must be postmarked or electronically transmitted within sixty (60) days from the date of this letter in order to be considered timely. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." Please cite the FOIPA Request Number assigned to your request so that it may be easily identified.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

For questions regarding our determinations, visit the [www.fbi.gov/foia](http://www.fbi.gov/foia) website under "Contact Us." The FOIPA Request number listed above has been assigned to your request. Please use this number in all correspondence concerning your request. Your patience is appreciated.

PX-4

You may file an appeal by writing to the Director, Office of Information Policy (OIP), U.S. Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's eFOIA portal at <http://www.justice.gov/oip/efoia-portal.html>. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIPA Request Number in any correspondence to us for proper identification of your request.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Hardy", with a stylized flourish at the end.

David M. Hardy  
Section Chief  
Record/Information  
Dissemination Section  
Records Management Division

Enclosure

Joseph M. Guarascio  
Req. # 70537-056  
F.C.I. Ft. Worth  
Ft. Worth, TX 76119

June 20, 2016

Director of Information Policy  
Department of Justice Ste.11050  
1425 New York Avenue N.W.  
Washington, DC 20530-0001

Re:FOIPA Request # 1344722-000

FREEDOM of INFORMATION ACT APPEAL

Dear Sir or Madam,

In response to the denial of my information request via FOIA, dated June 10, 2016, I am officially appealing this decision.

It should be noted that at no time did I agree to give up my rights to this information. It was not in the plea agreement that I signed. I was never advised in "open court" that I was forfeiting these rights. It should also be noted that I did not authorize attorney Mark Edwards to do so on my behalf. In fact, it should be recorded that Mr. Edwards was terminated "Fired" as my attorney for ineffective assistance he provided and I had since filed to the court an appeal motion stating such.

Therefore, I would request that your office provide proof of this forfeiture and that your office grant my appeal and provide the information as requested.  
Thank you for your time in advance.

Sincerely,

  
Joseph Guarascio

PX-5

1425 New York Avenue N.W.  
Suite 11050  
Washington, DC 20005

Joseph M. Guarascio  
Register No. 70537-056  
FCI Fort Worth  
P.O. BOX 15330  
Fort Worth, TX 76119

July 13, 2016

Dear Mr. Guarascio,

This is to advise you that your administrative appeal from the action of the Federal Bureau of Investigation regarding Request No. 1344722 was received by this Office on 07/07/2016.

The Office of Information Policy has the responsibility of adjudicating such appeals. In an attempt to afford each appellant equal and impartial treatment, we have adopted a general practice of assigning appeals in the approximate order of receipt. Your appeal has been assigned number DOJ-AP-2016-004182. Please mention this number in any future correspondence to this Office regarding this matter. Please note that if you provide an e-mail address or another electronic means of communication with your request or appeal, this Office may respond to your appeal electronically even if you submitted your appeal to this Office via regular U.S. Mail.

We will notify you of the decision on your appeal as soon as we can. If you have any questions about the status of your appeal, you may contact me at the number above. If you have submitted your appeal through FOIAonline, you may also obtain an update on the status of your appeal by logging into your account.

Sincerely,

Priscilla Jones

Digitally signed by Priscilla Jones  
DN: cn=Priscilla Jones, o=DOJ,  
email=priscilla.jones@usdoj.gov, c=US  
Date: 2016.07.15 10:40:33 -0400

Priscilla Jones

Supervisory Administrative Specialist

PX-6



**U.S. Department of Justice**  
**Office of Information Policy**  
*Suite 11050*  
*1425 New York Avenue, NW*  
*Washington, DC 20530-0001*

Telephone: (202) 514-3642

**July 18, 2016**

Mr. Joseph M. Guarascio  
Register No. 70537-056  
Federal Correctional Institution  
Post Office Box 15330  
Fort Worth, TX 76119

Re: Appeal No. DOJ-AP-2016-004182  
Request No. 1344722  
CDT:JMB

**VIA: U.S. Mail**

Dear Mr. Guarascio:

You appealed from the action of the Federal Bureau of Investigation on your Freedom of Information Act request for access to records concerning your criminal case.

After carefully considering your appeal, I am affirming the FBI's action on your request. The FBI determined that under the terms of a signed plea agreement filed with the United States District Court for the Eastern District of North Carolina on September 21, 2009, you waived all rights to make any FOIA request or receive any records concerning your criminal case. I have determined that the FBI response was correct. Statutory provisions are presumed to be subject to waiver by voluntary agreement, "absent some affirmative indication in the statute of Congress' intent to preclude waiver." United States v. Mezzanatto, 513 U.S. 196, 201 (1995) (citing Evans v. Jeff D., 475 U.S. 717, 730-32 (1986)). Neither the FOIA nor the Privacy Act contains any indication that Congress intended to preclude waiver. See 5 U.S.C. §§ 552 and 552a, respectively. Consequently, for purposes of your request, the waiver of your FOIA and Privacy Act rights contained in your plea agreement is presumed to be valid, and the FBI properly refused to process your request.

Please be advised that this Office's decision was made only after a full review of this matter. Your appeal was assigned to an attorney with this Office who thoroughly reviewed and analyzed your appeal, your underlying request, and the action of the FBI in response to your request. If you have any questions regarding the action this Office has taken on your appeal, you may contact this Office's FOIA Public Liaison for your appeal. Specifically, you may speak with the undersigned agency official by calling (202) 514-3642.

If you are dissatisfied with my action on your appeal, the FOIA permits you to file a lawsuit in federal district court in accordance with 5 U.S.C. § 552(a)(4)(B).

For your information, the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-

PX-7

- 2 -

exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; e-mail at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Sincerely,

X 

---

Christina D. Troiani, Associate Chief, for  
Sean O'Neill, Chief, Administrative Appeals Staff



Joseph M. Guarascio  
Reg. # 70537-056  
F.M.C. Fort Worth  
P.O. Box 15330  
Ft. Worth, TX 76119

March 19, 2018

Federal Bureau of Investigation  
Record / Information Dissemination Section  
170 Marcel Drive  
Winchester, VA. 22601-4843

Re: Second FOIA / Privacy Act Request # 1344722-000

Dear Public Information Officer,

In early 2016 I filed a FOIA request pursuant to 5 USC §§ 552, 552 (a) et seq., respectively.

In June of 2016, I received a denial letter stating I had forfeited my rights to this information in my plea agreement dated in August, 2009. I appealed this decision citing various reasons and was again denied.

In light of the recent decision in *Price v. DOJ*, 2017 BL 272433, D.C. Cir., No. 15-5314, 8/14/17, (appended hereto), which states during an IAC claim, failure to obtain my case information would restrict my abilities to proceed with my claim.

"Price, however, has shown that enforcing a FOIA waiver could make it harder for litigants to discover material supporting an ineffective-assistance-counsel claim or to find exculpatory information."

As such, I am again formally requesting the information listed in my initial request.

It should be noted that my criminal case is still under appeal in the Fifth Circuit, Case # 4:17-CV-01021-Y, and said information is necessary to prepare for rebuttal.

I Thank you for your time in advance.

Respectfully,

Joseph Guarascio

PX-8

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

JOSEPH MICHAEL GUARASCIO,

Petitioner,

v.

ERIC D. WILSON, WARDEN, FMC FORT  
WORTH,

Respondent.

Civil Action No. 4:17-CV-1021-Y

**RESPONSE TO HABEAS PETITION UNDER 28 U.S.C. § 2241**

Petitioner Joseph Michael Guarascio's habeas petition under 28 U.S.C. § 2241 should be dismissed because he fails to demonstrate that the "savings clause" of 28 U.S.C. § 2255(e) applies to allow him to seek relief under section 2241. As explained herein, Guarascio has not demonstrated that section 2255 is "inadequate or ineffective" and he has had an opportunity to make the same arguments against his conviction in a section 2255 motion, but was unsuccessful and had that motion denied. Accordingly, Guarascio's section 2241 petition should be dismissed.

**I. BACKGROUND**

On August 27, 2009, Guarascio was charged in a criminal information in the Eastern District of North Carolina for Manufacturing of Child Pornography, in violation 18 U.S.C. §§ 2251 (a) and (d). (Appendix pg. 6, dkt. # 1.) On September 21, 2009, Guarascio entered a guilty plea to the criminal information pursuant to a plea agreement. (Appendix pg. 6, dkt. #8.) The plea agreement stated that the minimum penalty for

manufacturing child pornography is 15 years' imprisonment. The Court also advised Guarascio of this fact. (Appendix pg. 7.) On February 9, 2010, the Court held the sentencing hearing and adopted the undisputed facts set forth in the presentence investigation report. (Appendix pg. 5, dkt. # 22.) The Court calculated the advisory guideline imprisonment range to be 235 to 293 months. (Appendix pg. 5, dkt # 22.) The Government moved for a downward departure pursuant to section 5K1.1, which the Court granted. (*Id.*) Guarascio was sentenced to the mandatory minimum of 180 months' imprisonment. (Appendix pg. 14-19.) Guarascio did not file a direct appeal. He did, however file a motion to vacate his conviction or sentence under 28 U.S.C. § 2255. (Appendix pg. 20.) The motion was dismissed and Guarascio appealed to the Fourth Circuit Court of Appeals. (Appendix pg. 4, dkt. # 47, 49.) A certificate of appealability was denied and the appeal was dismissed. (Appendix pg. 3-4, dkt. # 50, 53.) Guarascio also sought permission to file a successive motion, that motion was denied. (Appendix, pg. 2, dkt. # 68.)

## II. STANDARD OF REVIEW

A petition for writ of habeas corpus under 28 U.S.C. § 2241 and a motion to vacate, set aside, or correct a sentence under 28 U.S.C. § 2255 "are distinct mechanisms for seeking post-conviction relief." *Pack v. Yusuff*, 218 F.3d 448, 451 (5th Cir. 2000). Section 2255 is the proper means of attacking errors that occurred at or before sentencing. *Ojo v. INS*, 106 F.3d 680, 683 (5th Cir. 1997). By contrast, section 2241 is a means of attacking the manner in which a sentence is executed (e.g., for attacking how the Federal Bureau of Prisons calculates a release date when taking into account things

like presentence time in custody). *See Tolliver v. Dobre*, 211 F.3d 876, 877 (5th Cir. 2000); *United States v. Cleto*, 956 F.2d 83, 84 (5th Cir. 1992). A section 2241 petition that challenges the validity of a federal conviction and sentence, therefore, generally must either be dismissed or construed as a section 2255 motion. *Pack*, 218 F.3d at 452.

Notwithstanding this general rule, the savings clause of section 2255(e) permits the use of a section 2241 petition to challenge the validity of a sentence in certain limited circumstances. Section 2255(e) states:

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. § 2255(e). Hence, the Court may consider a section 2241 petition attacking a sentence's validity only if the petitioner establishes that the remedy under section 2255 is "inadequate or ineffective." *See Tolliver*, 211 F.3d at 878; *see also Pack*, 218 F.3d at 452 (explaining that the petitioner has the burden to show that the section 2255 remedy is inadequate or ineffective so as to trigger the savings clause).

The bar against filing successive section 2255 motions does not render section 2255 "inadequate or ineffective" within the meaning of the savings clause. *Tolliver*, 211 F.3d at 878. Nor does the fact that a petitioner who never filed a first section 2255 motion may now be barred from doing so by the one-year statute of limitations. *See United States v. Lurie*, 207 F.3d 1075, 1077 (8th Cir. 2000); *Loredo v. Joslin*, No. 3:04-CV-2070-N, 2004 WL 2208124, at \*1 (N.D. Tex. Oct. 1, 2004). Instead, the Fifth Circuit

has held that the savings clause of section 2255(e) applies to a claim only if:

- (1) the [§ 2241] petition raises a claim “that is based on a retroactively applicable Supreme Court decision”;
- (2) the claim was previously “foreclosed by circuit law at the time when [it] should have been raised in petitioner’s trial, appeal or first § 2255 motion”; and
- (3) that retroactively applicable decision establishes that “the petitioner may have been convicted of a nonexistent offense.”

*Santillana v. Upton*, 846 F.3d 779, 782 (5th Cir. 2017) (quoting *Garland v. Roy*, 615 F.3d 391, 394 (5th Cir. 2010) (quoting *Reyes-Requena v. United States*, 243 F.3d 893, 895 (5th Cir. 2001))) (line breaks added).<sup>1</sup>

When a petitioner cannot satisfy the savings clause, the proper disposition is dismissal of the section 2241 petition for lack of jurisdiction. *See Lang v. Wilson*, No. 4:16-CV-1018-O, 2018 WL 684890, at \*3 (N.D. Tex. Feb. 1, 2018) (citing *Christopher v. Miles*, 342 F.3d 378, 379, 385 (5th Cir. 2003)).

### **III. THE COURT LACKS JURISDICTION BECAUSE GUARASCIO FAILS TO MEET THE SECTION 2255 SAVINGS CLAUSE.**

Guarascio has failed to establish any of the three elements that the Fifth Circuit requires to allow a claim to proceed under the savings clause. *See Santillana*, 846 F.3d at

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<sup>1</sup> In *Prost v. Anderson*, 636 F.3d 578 (10th Cir. 2011), the Tenth Circuit held that if a section 2241 petitioner’s arguments could have been tested in an initial section 2255 motion, the savings clause does not apply and a section 2241 petition is not available—even if the petitioner is relying on some previously “novel” argument of statutory interpretation that the Supreme Court had not yet approved at the time the initial section 2255 motion was due and was “foreclosed” by circuit precedent at the time. The government would urge the Court to adopt the *Prost* approach here, but the government also recognizes that the Fifth Circuit has adopted a slightly different test as set forth in *Reyes-Requena*, and that *Reyes-Requena* represents binding precedent that must be followed by the Court here. In any event, Guarascio cannot show that the savings clause applies to his case under either possible test.

782. First, Guarascio's claim is not based on a retroactively applicable Supreme Court decision. In fact, Guarascio is not even relying on a Supreme Court decision in his petition. Guarascio does not cite any Supreme Court decision that reinterprets the elements of his offense. Accordingly, he cannot proceed under section 2241.

Second, Guarascio does not assert that his claims were foreclosed by circuit law at the time they should have been raised in his trial, appeal, or first section 2255 motion. Guarascio has not met his burden to show that a section 2255 remedy is inadequate or ineffective. In fact, Guarascio raised each of these claims in his section 2255 motion that was denied. Consequently, his petition should be dismissed.

Third, Guarascio cannot show that he may have been convicted of a nonexistent offense. Guarascio relies on no cases to establish that he was convicted of a nonexistent offense. Instead he argues that he didn't actually commit the crime he was convicted of—the exact same arguments he presented in his original section 2255 motion. Those arguments were addressed and denied. Guarascio appealed and he sought a certificate of appealability twice, and it was denied both times. Simply because his prior section 2255 motion was unsuccessful does not show that the section 2255 remedy was “inadequate or ineffective” within the meaning of the savings clause. *Pack*, 218 F.3d at 453. “[M]erely failing to succeed in a section 2255 motion does not establish the inadequacy or ineffectiveness of the section 2255 remedy.” *Id.* Savings-clause relief is unavailable to Guarascio.

Finally, even if Guarascio could somehow overcome all three bars to his claim discussed above, he knowingly waived any right to appeal or collaterally attack his

conviction and sentence as part of his plea agreement. (Appendix, pg. 7, paragraph c.)

Generally, “an informed and voluntary waiver of post-conviction relief is effective.”

*United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994). The waiver in Guarascio’s plea agreement should be enforced here and bars any relief.

#### **IV. GUARASCIO’S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM DOES NOT COME WITHIN THE SAVINGS CLAUSE.**

Guarascio lastly asserts a claim for ineffective assistance of counsel because his attorney recommended that he sign a plea agreement. (Petition at p. 14.) This claim, like his others, does not satisfy the savings clause test. The claim fails on the first prong of the savings clause test because it is not based on a retroactively applicable Supreme Court decision that establishes Guarascio’s innocence. Moreover, the claim does not satisfy the second prong of the test because it could have been raised on direct appeal or in a section 2255 motion, which it was, and Guarascio also does not show that circuit precedent foreclosed him from raising an ineffective assistance claim. *See, e.g., Ball v. Conner*, 2003 WL 22971285, at \*1 (5th Cir. Dec. 10, 2003) (determining that ineffective assistance claim failed to satisfy the requirements of the savings clause). Accordingly, Guarascio’s claim does not come within the savings clause, and he cannot obtain relief under section 2241.

#### **V. CONCLUSION**

This Court lacks jurisdiction because Guarascio fails to show that a section 2255 remedy is inadequate or ineffective. The respondent respectfully asks that the habeas application be dismissed.

Respectfully submitted,

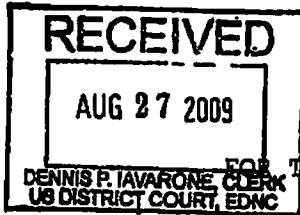
ERIN NEALY COX  
UNITED STATES ATTORNEY  
/s/ Ann E. Cruce-Haag  
ANN E. CRUCE-HAAG  
Assistant United States Attorney  
Texas Bar No. 24032102  
1205 Texas Avenue, Suite 700  
Lubbock, Texas 79401  
Telephone: (806) 472-7351  
Facsimile: (806) 472-7394  
Email: ann.haag@usdoj.gov

**CERTIFICATE OF SERVICE**

On March 20, 2018, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Ann E. Cruce-Haag  
ANN E. CRUCE-HAAG  
Assistant United States Attorney





FILED IN OPEN COURT  
ON 9-21-09  
Dennis P. Iavarone, Clerk  
US District Court  
Eastern District of NC

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
SOUTHERN DIVISION

NO. 7:09-CR-109-1-D

UNITED STATES OF AMERICA

v.

JOSEPH MICHAEL GUARASCIO

MEMORANDUM OF PLEA AGREEMENT

The United States of America ("United States"), by and through the United States Attorney for the Eastern District of North Carolina ("USA-EDNC"), and the Defendant, with the concurrence of the Defendant's Attorney, Mark E. Edwards, have agreed that the above-captioned case should be concluded in accordance with this Memorandum of Plea Agreement as follows:

1. This Memorandum constitutes the full and complete record of the Plea Agreement. There are no other agreements between the parties in addition to or different from the terms herein.

2. The Defendant agrees:

- a. To waive Indictment and plead guilty to the Criminal Information herein.
- b. To make restitution to any victim, including any victim with respect to a Count dismissed as part of the agreement, in whatever amount the Court may order, pursuant to 18 U.S.C. §§ 2259, 3663 and 3663A. Said restitution shall be due and payable immediately.
- c. To waive knowingly and expressly all rights, conferred by 18 U.S.C. § 3742, to appeal whatever sentence is imposed, including any issues that relate to the establishment of the advisory Guideline range, reserving only the right to appeal from a sentence in excess of the applicable advisory Guideline range that is established at sentencing, and further to waive all rights to contest the conviction or sentence in any post-conviction proceeding, including one pursuant to 28 U.S.C. § 2255, excepting an appeal or motion based upon grounds of ineffective assistance of counsel or

prosecutorial misconduct not known to the Defendant at the time of the Defendant's guilty plea. The foregoing appeal waiver does not constitute or trigger a waiver by the United States of any of its rights to appeal provided by law.

- d. To waive all rights, whether asserted directly or through a representative, to request or receive from the United States any records pertaining to the investigation or prosecution of this matter, except as provided in the Federal Rules of Criminal Procedure. This waiver includes, but is not limited to, rights conferred by the Freedom of Information Act and the Privacy Act of 1974.
- e. To assist the United States in the recovery and forfeiture of any assets which facilitated and/or were acquired through unlawful activities, including all such assets in which the Defendant has any interest or control. To assist the United States in the recovery and forfeiture of any assets which facilitated and/or were required through unlawful activities, including all such assets in which the defendant has any interest or control. Specifically, the Defendant agrees to voluntarily forfeit and relinquish to the United States the property specified in the Information. The Defendant further agrees to sign any documents necessary to effectuate the forfeiture and waives any further notice. In addition, the Defendant forfeits and otherwise waives any ownership right in all items seized during the investigation of the acts alleged in the Information. The Court has jurisdiction over the disposition of such items and may order the investigative agency to dispose of the items in such manner as provided by the agency's regulations.
- f. To pay a special assessment of \$100.00, pursuant to the provisions of 18 U.S.C. § 3013. The assessment shall be paid by the Defendant at sentencing. The Defendant or Defendant's counsel shall provide a check in payment of the said assessment directly to the Clerk, U.S. District Court/EDNC.
- g. To complete and submit, if requested, a financial statement under oath to the Office of the USA-EDNC no later than two weeks after the entry of the guilty plea.

- h. To abide by any conditions of release pending sentencing and report timely for service of sentence.
- i. Whenever called upon to do so by the United States, (1) to disclose fully and truthfully in interviews with Government agents information concerning all conduct related to the Information and any other crimes of which the Defendant has knowledge, and (2) to testify fully and truthfully in any proceeding. These obligations are continuing ones. The Defendant agrees that all of these statements can be used against the Defendant at trial if the Defendant withdraws from this plea agreement or is allowed to withdraw the guilty plea.
- j. If the Defendant provides false, incomplete, or misleading information or testimony, this would constitute a breach of this Agreement by the Defendant, and the Defendant shall be subject to prosecution for any federal criminal violation. Any information provided by the Defendant may be used against the Defendant in such a prosecution.
- k. To submit to a polygraph examination whenever requested by the Office of the USA-EDNC. The results of these examinations will be admissible only at the Defendant's sentencing, and at any hearing as to whether there has been a breach of this agreement. The United States may rely on these results in determining whether the Defendant has fulfilled any obligation under this Agreement.
- l. To knowingly and expressly waive any and all rights, under the Fifth and Sixth Amendments to the United States Constitution and any cases interpreting them, to have the existence and applicability of any prior convictions (1) charged in the Information, (2) submitted to a jury, and (3) proved beyond a reasonable doubt. The defendant hereby consents to having the existence and applicability of any such convictions decided by the sentencing judge based on a preponderance of the evidence. The defendant reserves the right to contest at sentencing the existence of any such prior conviction and whether such conviction qualifies to increase the statutory minimum and maximum sentence, but consents to the resolution of any such objection by the sentencing

judge using a preponderance-of-the-evidence standard.

3. The Defendant understands, agrees, and admits:

a. That as to the Information to which the Defendant is pleading guilty, the charge, code section, elements, and applicable penalties are as follows:

(1) Charge: Manufacturing Child Pornography

(2) Dates of the offense: May, 2008.

(3) Code: 18 U.S.C. §§ 2251(a) and (d)

(4) Elements:

First: The Defendant attempted to and did employ, use, persuade, induce, entice, and coerce;

Second: a minor child;

Third: to engage in sexually explicit conduct;

Fourth: for the purpose of producing visual depictions of such conduct; and

Fifth: the visual depictions were produced using materials that had been mailed, shipped, and transported in interstate and foreign commerce.

(5) Maximum term of imprisonment: 30 years.

(6) Minimum term of imprisonment: 15 years

(7) Maximum term of supervised release: minimum 5 years up to life

(8) Maximum term of imprisonment upon revocation of supervised release: up to life

\* If the defendant has ONE prior conviction under Chapter 110, section 1591, chapter 71, chapter 109A, or chapter 117 under Title 18, United States Code, or under section 920 of Title 10 or under the laws of any State relating to aggravated sexual abuse, sexual abuse, abusive sexual

contact involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment or transportation of child pornography, then the applicable penalties in lieu of (4) through (7) above are as follows:

- \* (4) Maximum term of imprisonment: 50 years
  - \* (5) Minimum term of imprisonment: 25 years
  - \* (6) Maximum term of supervised release: minimum 5 years up to life
  - \* (7) Maximum term of imprisonment upon revocation of supervised release: up to life
  - (8) Maximum fine: \$250,000
  - (9) Restitution pursuant to 18 U.S.C. §§ 2259, 3663 and 3663A, and as agreed in paragraph 2(b) above.
  - (10) Special assessment: \$100
- b. That any sentence imposed will be without parole.
- c. That the Court will take into account, but is not bound by, the applicable United States Sentencing Guidelines, that the sentence has not yet been determined by the Court, that any estimate of the sentence received from any source is not a promise, and that even if a sentence up to the statutory maximum is imposed, the Defendant may not withdraw the plea of guilty.
- d. That, unless Defendant is found unable to pay, the Court will impose a fine, and failure to pay it will subject Defendant to additional criminal and civil penalties pursuant to 18 U.S.C. §§ 3611-14.
- e. The defendant has been advised and understands, that under the Sex Offender Registration and Notification Act, the defendant must register and keep the registration current in each of the following jurisdictions: the location of the defendant's residence, the location of the defendant's employment; and, if the defendant is a student, the location of the defendant's school. Registration will require that the defendant provide information

and addresses of any places at which the defendant is or will be an employee or a student. The defendant understands that he must update his registrations not later than three business days after any change of name, residence, employment, or student status. The defendant understands that failure to comply with these obligations subjects the defendant to prosecution for failure to register under federal law, 18 U.S.C. § 2250, which is punishable by a fine or imprisonment, or both.

4. The United States agrees:

- a. That it reserves the right to make a sentence recommendation.
- b. That it reserves the right at sentencing to present any evidence and information pursuant to 18 U.S.C. § 3661, to offer argument or rebuttal, to recommend imposition of restitution, and to respond to any motions or objections filed by the Defendant.
- c. That the USA-EDNC will not further prosecute the Defendant for conduct constituting the basis for the Information; however, this obligation is limited solely to the USA-EDNC and does not bind any other state or federal prosecuting entities.
- d. That it will make known to the Court at sentencing the full extent of the Defendant's cooperation, but the United States is not promising to move for departure pursuant to U.S.S.G. §5K1.1, 18 U.S.C. § 3553(e), or Fed. R. Crim. P. 35.
- e. Pursuant to U.S.S.G. §1B1.8, that self-incriminating information provided by the Defendant pursuant to this Agreement shall not be used against the Defendant in determining the applicable advisory Guideline range, except as provided by §1B1.8 and except as stated in this Agreement. The United States will not, however, withhold from the United States Probation Office any evidence concerning relevant conduct.
- f. That the USA-EDNC agrees not to share any information provided by the Defendant pursuant to this Agreement with other state or federal prosecuting entities except upon their agreement to be bound by the terms of this Agreement.

5. The parties agree to the following positions as to the below-listed sentencing factors only, which are not binding on the Court in its application of the advisory Guideline range; provided that if Defendant's conduct prior to sentencing changes the circumstances with respect to any such factors, the United States is no longer bound to its positions as to those factors:

- a. A downward adjustment of 3 levels for acceptance of responsibility is warranted under U.S.S.G. §3E1.1.

This the 24<sup>th</sup> day of August, 2009.

GEORGE E.B. HOLDING  
United States Attorney

Joseph M. Guarascio  
JOSEPH MICHAEL GUARASCIO  
Defendant

BY: Ethan A. Ontjes  
ETHAN A. ONTJES  
Assistant United States Attorney  
Criminal Division

Mark E. Edwards  
MARK E. EDWARDS  
Attorney for the Defendant

APPROVED, this 21 day of September, 2009.

James Dever  
United States District Judge



Federal Bureau of Investigation

Washington, D.C. 20535

May 9, 2018

MR. JOSEPH MICHAEL GUARASCIO  
 \*\*70537-056  
 F.M.C. FORT WORTH  
 POST OFFICE BOX 15330  
 FORT WORTH, TX 76119

FOIPA Request No.: 1344722-001  
 Subject: GUARASCIO, JOSEPH MICHAEL  
 (DOCUMENTS, PROPERTY VOUCHERS,  
 EVIDENCE, ETC)

Dear Mr. Guarascio:

This is in further reference to your Freedom of Information/Privacy Acts (FOIPA) request.

Pursuant to the terms of a Plea Agreement dated August 24, 2009 which you and your attorney, Mark E. Edwards, entered into with the United States of America in the case captioned United States v. Joseph Michael Guarascio Case No: 7:09-CR-00109-D-1, United States District Court, District of North Carolina, Eastern Division, ("Plea Agreement"):

You waived all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case including, without limitation, any records that may be sought under the Freedom of Information Act, 5 U.S.C. §552, or the Privacy Act of 1974, 5 U.S.C. §552a.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

Accordingly, we cannot process your FOIPA request and are unable to be of any further assistance in this matter.

You may file an appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site: <https://foiaonline.regulations.gov/foia/action/public/home>. Your appeal must be postmarked or electronically transmitted within sixty (60) days from the date of this letter in order to be considered timely. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." Please cite the FOIPA Request Number assigned to your request so that it may be easily identified.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

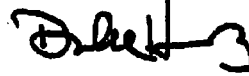
For questions regarding our determinations, visit the [www.fbi.gov/foia](http://www.fbi.gov/foia) website under "Contact Us." The FOIPA Request number listed above has been assigned to your request. Please use this number in all correspondence concerning your request. Your patience is appreciated.

PX-10



You may file an appeal by writing to the Director, Office of Information Policy (OIP), U.S. Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's eFOIA portal at <http://www.justice.gov/oip/efoia-portal.html>. Your appeal must be received by OIP within sixty (60) days from the date of this letter in order to be considered timely. The envelope and the letter should be clearly marked "Freedom of Information Appeal." Please cite the FOIPA Request Number in any correspondence to us for proper identification of your request.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Hardy", with a stylized flourish at the end.

David M. Hardy  
Section Chief  
Record/Information  
Dissemination Section  
Records Management Division

Enclosure

Joseph Michael Guarascio  
Reg. No. 70537-056  
Federal Medical Center  
P.O. Box 15330  
Fort Worth, Texas 76119-0330

May 14, 2018

Director  
Office of Information Policy  
United States Department of Justice  
Suite 11050  
1425 New York Avenue, N.W.  
Washington, D.C. 20530-0001

Re: Appeal FOIPA Request No. 1344722-001

Dear Sir/Madam:

I am appealing the denial of my FOIA request referenced above stating as the basis of denial the terms of a Plea Agreement dated August 24, 2009.

I assert that the filed Plea Agreement referenced in my rejection letter, attached hereto, is a fraudulent document (newly discovered as it was previously sealed by the Court and unavailable to me) that does not reflect the Agreement to which I knowingly and intelligently entered. As evidence of this document's fraudulent nature, I point to the last two pages of the document which clearly indicate those two pages were faxed whereas the first five pages were not. I assert that the contents of those first five pages, including the alleged "waiver of all rights" ... "to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case including, without limitation, any records that may be sought under the Freedom of Information Act, 5 U.S.C. §552, or the Privacy Act of 1974, 5 U.S.C. §552a."

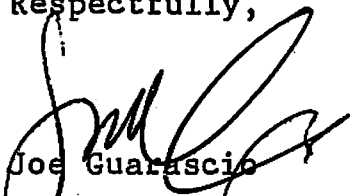
I did not, nor would I ever, agree to such terms. I am in the process of filing a civil lawsuit against my attorney for collusion with the Government Prosecutor in my case. In any event, I submit that the circumstantial evidence that exists in the nature of this document demonstrates that it was not entered into knowingly and intelligently by me in the criminal proceedings.

Thus, I respectfully ask that you release the information I previously requested in my FOIA request.

PX-11

Thank you in advance for your time, attention, and forthcoming reply.

Respectfully,



Joe Guarascio

cc: file

1425 New York Avenue N.W.  
Suite 11050  
Washington, DC 20005

Joseph M. Guarascio  
Register No. 70537-056  
FMC Fort Worth  
P.O. Box 15330  
Fort Worth, TX 76119

June 5, 2018

Dear Mr. Guarascio,

This is to advise you that your administrative appeal from the action of the Federal Bureau of Investigation regarding Request No. 1344722-001 was received by the Office of Information Policy (OIP) of the U.S. Department of Justice on 05/25/2018.

OIP has the responsibility of adjudicating such appeals. In an attempt to afford each appellant equal and impartial treatment, we have adopted a general practice of assigning appeals in the approximate order of receipt. Your appeal has been assigned number DOJ-AP-2018-005901. Please mention this number in any future correspondence to this Office regarding this matter. Please note that if you provide an e-mail address or another electronic means of communication with your request or appeal, this Office may respond to your appeal electronically even if you submitted your appeal to this Office via regular U.S. Mail.

We will notify you of the decision on your appeal as soon as we can. If you have any questions about the status of your appeal, you may contact me at (202) 514-3642. If you have submitted your appeal through FOIAonline, you may also obtain an update on the status of your appeal by logging into your account.

Sincerely,

**PRISCILLA  
JONES**

Priscilla Jones

Supervisory Administrative Specialist

Digitally signed by  
PRISCILLA JONES  
Date: 2018.06.05 15:38:41  
-04'00'

PX-12



**U.S. Department of Justice**  
**Office of Information Policy**  
*Suite 11050*  
*1425 New York Avenue, NW*  
*Washington, DC 20530-0001*

*Telephone: (202) 514-3642*

Mr. Joseph M. Guarascio  
Register No. 70537-056  
Federal Medical Center  
Post Office Box 15330  
Fort Worth, TX 76119

Re: Appeal No. DOJ-AP-2018-005900  
Request No. 1344722  
CDT:JNW

**VIA: U.S. Mail**

Dear Mr. Guarascio:

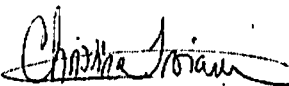
This responds to your letter dated May 14, 2018, attempting to appeal from the action of the Federal Bureau of Investigation on Freedom of Information Act Request No. 1344722.

Your additional appeal from your FOIA request for the above-referenced records was received by this Office and was assigned for adjudication under Appeal No. DOJ-AP-2018-005900. However, this Office subsequently learned that your appeal file was a duplicate of Appeal No. DOJ-AP-2016-004182, which was adjudicated by this Office by letter dated July 18, 2016 (copy enclosed)]. In light of these circumstances, I am administratively closing Appeal No. DOJ-AP-2018-005900 in this Office.

If you have any questions regarding the action this Office has taken on your appeal, you may contact this Office's FOIA Public Liaison for your appeal. Specifically, you may speak with the undersigned agency official by calling (202) 514-3642.

Sincerely,

7/13/2018

X 

Christina D. Troiani, Associate Chief, for  
Sean O'Neill, Chief, Administrative Appeals Staff  
Signed by: OIP

Enclosure

PX-13



**U.S. Department of Justice**  
**Office of Information Policy**  
*Suite 11050*  
*1425 New York Avenue, NW*  
*Washington, DC 20530-0001*

*Telephone: (202) 514-3642*

**July 18, 2016**

**Mr. Joseph M. Guarascio**  
**Register No. 70537-056**  
**Federal Correctional Institution**  
**Post Office Box 15330**  
**Fort Worth, TX 76119**

**Re: Appeal No. DOJ-AP-2016-004182**  
**Request No. 1344722**  
**CDT:JMB**

**VIA: U.S. Mail**

**Dear Mr. Guarascio:**

You appealed from the action of the Federal Bureau of Investigation on your Freedom of Information Act request for access to records concerning your criminal case.

After carefully considering your appeal, I am affirming the FBI's action on your request. The FBI determined that under the terms of a signed plea agreement filed with the United States District Court for the Eastern District of North Carolina on September 21, 2009, you waived all rights to make any FOIA request or receive any records concerning your criminal case. I have determined that the FBI response was correct. Statutory provisions are presumed to be subject to waiver by voluntary agreement, "absent some affirmative indication in the statute of Congress' intent to preclude waiver." United States v. Mezzanatto, 513 U.S. 196, 201 (1995) (citing Evans v. Jeff D., 475 U.S. 717, 730-32 (1986)). Neither the FOIA nor the Privacy Act contains any indication that Congress intended to preclude waiver. See 5 U.S.C. §§ 552 and 552a, respectively. Consequently, for purposes of your request, the waiver of your FOIA and Privacy Act rights contained in your plea agreement is presumed to be valid, and the FBI properly refused to process your request.

Please be advised that this Office's decision was made only after a full review of this matter. Your appeal was assigned to an attorney with this Office who thoroughly reviewed and analyzed your appeal, your underlying request, and the action of the FBI in response to your request. If you have any questions regarding the action this Office has taken on your appeal, you may contact this Office's FOIA Public Liaison for your appeal. Specifically, you may speak with the undersigned agency official by calling (202) 514-3642.

If you are dissatisfied with my action on your appeal, the FOIA permits you to file a lawsuit in federal district court in accordance with 5 U.S.C. § 552(a)(4)(B).

For your information, the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-

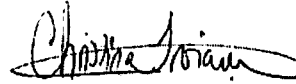
PX-14

- 2 -

exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001; e-mail at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Sincerely,

X



---

Christina D. Troiani, Associate Chief, for  
Sean O'Neill, Chief, Administrative Appeals Staff

Joseph M. Guarascio  
Reg. # 70537-056  
Federal Medical Center  
P.O. Box 15330  
Fort Worth, TX 76119

August 4, 2018

U.S. Department of Justice  
Office of Information Policy  
Attn: Christina Troiani, Assoc. Chief  
1425 New York Avenue N.W. Ste. 11050  
Washington, DC 20530-0001

RE: Appeal No. DOJ-AP-2018-005900, Request No. 1344722

Dear Ms. Troiani,

I have received your denial letter of 7/13/2018. I believe that there has been a misunderstanding as to the reason for my new application.

In my previous denial your office stated that, as part of my plea agreement, I "waived all my rights to make any FOIA request or receive any records concerning your criminal case". Knowing this was untrue as there was no such waiver in the agreement I signed, I requested a copy of the agreement that your office had reviewed, to no avail.

As such, I finally obtained a copy of, (the filed version), my plea agreement through a separate court action. (attached hereto). At which time I discovered that this is a fraudulent document and not the agreement that I had signed. The document in question has been blatantly altered with the last two pages, (6 & 7), being clearly from a different document, as noted by the print truncation and the FAX header at the top of those two pages only, and hence making the first five pages not part of the original agreement that I signed. It should also be noted that the original agreement that I signed contained numerous ink changes, initialed by my hand, that are not present in this document.

As I had advised in my most recent request, with the agreement attached, I am again officially reporting this fraud to your office and requesting an inquiry into this forgery.

After discovering this document was fraudulently filed and purported as the document I signed, I then immediately filed another motion to the court and my second FOIA request so I can ascertain what other documents have been submitted fraudulently.

Additionally, in my applications I also requested all

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information regarding my name, both prior to my criminal case and after my case concluded, for any waiver, fraudulent or otherwise surely would not have restricted that information.

Lastly, I would like to point to the recent decision in *Price v. DOJ*, (attached), where the court decried these waivers, holding that these restrictions "make it harder for litigants to discover materials supporting I.A.C. claims or to find exculpatory information", as in my situation where fraudulent papers have been filed in my case.

Consequently, I should not be held to a waiver that I clearly did not agree to and am hereby requesting that my FOIA application be processed and proper investigation commenced as to this criminal act.

I would like to thank you for your time in this matter.

Sincerely,



Joe Guarascio